No. 2974

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

AMERICAN TRADING COMPANY (PACIFIC COAST) (a corporation),

Plaintiff in Error,

vs.

NORTH ALASKA SALMON COMPANY,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

OTTO IRVING WISE,
Attorney for Defendant in Error.

Filed this.....day of October, 1917.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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In this brief we shall present for consideration by the court:

1. A statement of the evidence, avoiding as far as possible a repetition of the facts stated by plaintiff in its memorandum.

2. An analysis of plaintiff's second amended complaint upon which the cause was tried, from which we expect to show that under no circumstances would plaintiff have been entitled to a verdict. As the jury awarded plaintiff nominal damages, no error can be predicated thereon.

3. A discussion of the errors assigned to the ruling of the trial court in refusing to admit the

judgment rolls in various actions in which portions of the salmon sold to plaintiff by defendant was condemned and destroyed.

4. A review of the instructions given and excluded by the trial court both upon the merits and upon the proposition that no proper exception was taken thereto and that the same cannot be reviewed in this proceeding.

In this manner we expect to fully answer all of the arguments advanced by plaintiff and show to the satisfaction of the court that the judgment should be affirmed.

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1. STATEMENT OF EVIDENCE.

Defendant was engaged in the business of canning Alaska salmon. Plaintiff was engaged in the brokerage business, and for several years prior to the time of the present controversy purchased the greater part of defendant's output of "do-over" grade salmon. Defendant's canneries were situated at Bristol Bay, in northern Alaska. The run of salmon in this district commences about the middle of July and continues for about two or three weeks. The fish when caught are piled upon a dock; they are then cleaned and cut into pieces the size of the salmon can; the cans are filled automatically and the tops soldered on. The fish is then placed in retorts and cooked for about an half hour at a temperature of 212 degrees Fahrenheit. This cooking causes the air in the cans to expand and the ends are

puffed when the fish is taken from the retort. If the can has a leak, the ends are normal and these cans are immediately removed from the pack; those cans which are found to be in good condition are struck by a small mallet with a pinpoint in the end, which causes the ends to collapse and they are immediately resoldered, thus causing a partial vacuum. The perfect cans are then returned to the retort and cooked again for about an hour at a temperature of 240 degrees. This completes the cooking process. The cans are then tested for leaks by tapping with a small sounding iron and are also immersed in hot water, and air bubbles will appear upon any can which has developed a leak. All defective cans are removed at once from the balance of the pack, as in the first cooking, and are then reprocessed; that is, the leaks are mended with solder and the fish then undergoes the same treatment as has just been outlined.

These reprocessed tins are known as "do-overs". At this point we beg to direct the court's attention to the fact that do-over salmon contains the identical quality of fish as prime or first grade salmon. The only difference between the two is that the do-over salmon has been allowed to stand exposed to the air for some time after the leak was discovered and before the reprocessing is commenced.

Experts called by plaintiff testified that if the defective cans were mended within a day after the discovery of the leak, the fish would not deteriorate and the finished product would be equal as an article

of food to standard salmon. But the practical business men, who testified emphasized the fact that "do-over" salmon was a doubtful commodity and a person who bought it expected to find a certain percentage spoiled. W. A. Frost, plaintiff's agent, testified (Trans. p. 117):

> "In handling do-over salmon the amount of bad tins varies considerably. A man who buys do-over salmon expects to find a certain percentage bad."

This fact, known generally to the trade, is the explanation offered for the disparity of price between standard and do-over salmon. The latter are sold for about one-half the price which is paid for the former.

The testimony of Henry F. Fortman, president of the Alaska Packers' Association, the largest producers of canned salmon on the Pacific Coast, illustrates why the canners will not warrant the quality of do-overs.

> "Anyone buying do-overs knows that they take chances on goods of this kind. *If the do-overs were all mended, if such a thing were possible, they would be equal to any first-class salmon.* * * *
>
> "In the do-overs you possibly find ½ of the cans in reasonably good condition, another ¼ fit for consumption, but they would be partially dry or something of that sort, and ¼ *would probably be unfit for use.*
>
> "I do not know the percentage of do-overs put up by the Alaska Packers' Association that was absolutely unfit to eat, because we generally sold our do-overs without reclamation * * *

> If you sell do-overs with a guarantee you might as well sell them for prime salmon because if they can return all the poor ones and keep all the good ones, there is no reason for reducing the price on do-overs. * * *
>
> "As a rule do-overs were sold after examination; the purchaser had a right to examine them and pass his own judgment. We sold through J. K. Armsby & Company; they have made no reclamation on do-overs because we sold as is." (Trans. pp. 151-157.)

Oscar Hoffman and Joseph Durney, both dealers in canned foods, including salmon, corroborated this testimony in every detail.

The significance of this testimony will become more apparent when we subsequently come to discuss the question of failure of consideration.

Shipments of the season's pack from northern Alaska reach San Francisco during the months of September and October; the market price for the pack of that year is thereupon fixed.

There is no established market price for do-over salmon. It had been the custom of plaintiff and defendant for several years to contract for the purchase of the following year's output of do-over salmon immediately after the price of prime salmon was fixed for the current season. The price agreed upon was approximately half that quoted for prime salmon. Pursuant to this custom on November 16, 1911, plaintiff and defendant entered into a contract by the terms of which plaintiff agreed to purchase from defendant five thousand cases of do-over

grade of red Alaska salmon labeled "ARCHER" being the output of the following season's pack. This contract which was in writing contains the following provisions which are essential to a proper understanding of this controversy:

> "Archer Brand of salmon to be overhauled in San Francisco by sellers and all swells and rusty tins to be taken therefrom, after which no reclamation *of any nature* will be allowed.
> * * *
>
> "Buyers have privilege of inspecting salmon before taking delivery. Sellers guaranteeing goods to be equal to the 1911 pack."

Upon arrival in San Francisco, the salmon was overhauled and notice given to plaintiff that it was ready for delivery. Samples of the pack were requested, and the testimony shows that the samples were shipped to prospective customers in the East and the Orient. Plaintiff was able to dispose of approximately one-half of the shipment, representing to the purchasers that the salmon was number one quality. and with a guarantee against swells. (Trans. p. 121.) This was apparently necessary because the output of No. 1 salmon for the year 1912 was far in excess of the normal demand.

Plaintiff admits (Trans. p. 67):

> "When there is a large pack of standard, or No. 1, salmon, the market for do-overs drops proportionately to the quantity of No. 1. salmon."

In previous years plaintiff had been able to dispose of all of the do-overs it purchased from defendant before arrival of the pack in San Francisco.

The remaining 2100 cases were stored at San Francisco and could not be sold. Several months later complaints were made by Eastern purchasers to whom plaintiff had warranted the quality of the salmon, that some of the fish was unfit for human consumption. Reclamation by plaintiff was obligatory under the terms of its contracts of resale. How the reclamations were calculated, or for what proportion of the fish sold refund was made, nowhere appears in the record. It does appear affirmatively that some of the fish was retained and used by plaintiff's customers.

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2. APPLICATION OF FACTS TO THE PLEADINGS.

The amended complaint upon which the issues in this case were framed contained four counts. A demurrer to the first and third counts was sustained. The question to be determined in these proceedings is whether plaintiff was entitled to a substantial verdict under the second or fourth count of the amended complaint. We shall first consider the second count.

The following are the salient allegations:

The execution of the contract of November 16, 1911, referred to above is alleged, and a copy set forth as a part of the complaint; next it is alleged that the defendant warranted to plaintiff that the goods would be merchantable, edible and fit for human consumption; that relying upon such warranty plaintiff paid the purchase price; that subse-

quently plaintiff learned that the goods so shipped did not comply with the warranty but were adulterated within the meaning of the Pure Food and Drug Act; by reason of these facts plaintiff asks for the return of the purchase price. With reference to this count, plaintiff in his brief states:

> "The theory of plaintiff is and was that having entered into with defendant a valid and enforceable contract for the sale and delivery by the latter to it of five thousand cases of Archer Brand salmon, and defendant having delivered an inedible, contraband and utterly worthless article of food, in violation of the pure food laws of the United States, plaintiff received no goods for the purchase price paid by it therefor or was damaged by the breach of contract by defendant."

This action cannot be one for the recovery of the purchase price upon the ground that no consideration was received therefor. If this were the nature of the action, plaintiff would be required to rescind the contract prior to the commencement of the action, and restore or offer to restore everything of value which it received under the contract. It is not contended that plaintiff ever rescinded the the contract. The obvious result of its failure in this respect is that it did not restore or offer to restore the five thousand cases of salmon received under the contract. While it is true that it is unnecessary for a party rescinding a contract to restore that which is absolutely worthless, the evidence in this case shows that more than half of the merchandise here in controversy was in fact resold

by plaintiff and that plaintiff received the purchase price for such sales.

A carload of this fish was sold to the Merchants National Grocery Company of St. Louis. John E. Dummeyer, cashier of that concern, testified (Trans. p. 125):

> "Q. Do you remember how much was paid for that salmon?
>
> A. Yes, I have the invoices here; $3940.00. The exchange on the bill was $3.95; freight, $490, which makes a total of $4,433.95. * * * We received a credit of about $1350 from plaintiff."

From the testimony of its own witness, it is shown that plaintiff received and retained at least $2590 from the sale of the salmon, no part of which was ever tendered to defendant, though plaintiff contends that it was entitled to the return of the entire purchase price, upon the theory of a total failure of consideration. One who seeks to rescind a contract must place the other party in *status quo.*

Plaintiff seeks to avoid its omission to rescind upon the ground that the sale in controversy was void by reason of the fact that the salmon shipped from Alaska was contraband goods and that its shipment constituted a violation of the pure food laws. The contract was valid in its inception. This is admitted, for if the subject matter of the contract was an agreement to sell a product which violated the provisions of the pure food laws, the parties to such contract would be *in pari delicto* and the trial court would have been compelled to

leave them in the same position in which it found them.

Counsel cites many cases to the effect that an executed contract of sale where the consideration is illegal is void. We do not dispute this proposition, but the contract now before the court is an executory contract of sale, the goods contracted for not being in existence at the time the agreement was made.

If the contract was valid at the time of its execution (which is admitted) any illegal act in its performance, which was not contemplated at the time of the execution of the contract, will not invalidate it, but plaintiff's only remedy for such illegal act is for damages as for the breach of the contract. This was held by the Supreme Court of the United States in the case of Union Gold Mining Company v. Rocky Mountain National Bank, 96 Cal. 640.

> "When a statute prohibits an act or annexes a penalty for its commission, it does not follow that the unlawfulness of the act was meant to avoid a contract made in contravention of it."

The only remaining theory upon which this count can be sustained is that it is an action for damages for breach of warranty of the quality of the salmon. It will be noted that though there is an express warranty that the goods would be equal to the 1911 pack, such warranty is neither pleaded nor relied upon by plaintiff.

It is also stated in Barry v. Capen, 6 L. R. A., page 808:

> "If the contract was legal, it would not be made illegal by misconduct on the part of the plaintiff in carrying it out",

and cases cited.

In Fox v. Rogers, 171 Mass. 546, plaintiff sued to recover under a contract with defendant to lay drain pipes. A statute in Massachusetts required cast iron pipes. Defendant set up the illegality of the contract as a defense, alleging that plaintiff put in pipes that were not cast iron. Judge Holmes delivered the opinion of the court.

> "There is no policy of the law against plaintiff's recovery unless the contract was illegal, and a contract is not necessarily illegal because it is carried out in an illegal way * * * the supposed illegal acts entered neither into the promise nor into the consideration * * * it may be that if the pipes are not of the material required by law, they are liable to be taken up * * * but the only question is the fundamental one whether we can say, as a matter of law, that the contract was illegal and that plaintiff can recover nothing. That, in the opinion of the majority of the court, we cannot say."

In the same case, the following principle was laid down:

> "If it (the contract) can by its terms be performed lawfully, it will be treated as legal, even if it is performed in an illegal manner."

Plaintiff contends in support of its position, that (Plaintiff's Brief, p. 36):

> "The question which the jury was preliminarily called upon the decide was, in the language of the Supreme Court of this State, 'Did the plaintiff get what it intended to buy and did buy?' or 'Did it get what it bargained for?' "

We respectfully submit that the plaintiff did get what it bargained for. Mr. Fortman, whose testimony is quoted above, stated that in do-over salmon the purchaser expects to find about one-fourth unfit for human consumption. Plaintiff's representative, Mr. Frost, admitted that a certain percentage will be bad, his experience showing that it ran as high as sixty per cent. Mr. Field on behalf of plaintiff made an examination of the 2100 cases which were stored in San Francisco in the spring of 1913. This inspection was made under the personal supervision of a professional overhauler of canned salmon. About twenty-five per cent were found to be bad, which is the exact percentage which Mr. Fortman said one would expect to find in do-over salmon. Other examinations made at Eastern points shortly after shipment, disclosed a smaller percentage of spoiled cans (Trans. pp. 123, 128, 129).

The testimony of employees of defendant who worked in its canneries during the 1912 season, including its superintendent, was to the effect that the pack of 1912 was in every way equal to that of 1911; the same process was used; the same care observed in reprocessing; and even the same men employed. The only difference seems to be that in 1911 plaintiff was able to dispose of the salmon

purchased before arrival, but the market was so well supplied in 1912 that plaintiff in order to sell half of the fish was required to make the same guarantees which accompany sales of standard salmon. The result was that complaints were made and plaintiff required to refund to its customers in accordance with its guarantee. But in reply to the inquiry of plaintiff, we assert that it got exactly what it bargained for, do-over salmon of the 1912 pack, equal to the 1911 pack in all respects.

The trial court instructed the jury that the provision of the contract that after all swells and rusty tins had been removed from the pack "no reclamation of any nature will be allowed", meant that no claim for reclamation for swells or rusty tins would be allowed. This interpretation of the contract was, we submit, erroneous. The contract is in no sense ambiguous; it refers to reclamation of any nature. Had it been the intention of the parties to limit plaintiff's right to make claims for swells and rusty tins, the word "any" would have been omitted and the words "swells and rusty tins" inserted. Nor, is there any testimony which would have justified this interpretation. If defendant is correct in its assumption that the contract was intended to bar any right of recovery for breach of warranty after swells and rusty tins were removed, plaintiff has failed to state a cause of action, for there is neither an allegation nor proof that plaintiff's demand for reclamation was made in time. The record is to the

contrary; plaintiff did not assert its claim until long after delivery.

Because of the low price at which do-overs are sold and the expectancy that a very large percentage will be bad, it was undoubtedly the intention of the parties that the purchaser was to assume all risk in connection with the goods after delivery.

This view was taken by the Court of Appeals of Kentucky in the case of Pratt v. Morris, 87 S. W. 783. That was an action for breach of warranty for the sale of toilet articles by sample. The contract was in writing, and contained the following warranty:

> "All goods are warranted to be the same in quality, material and in all other respects as samples shown by salesmen and if goods are returned by the consumer for any cause they may be returned as above provided. The purchaser agrees to examine and inspect the goods and each part thereof at once upon their arrival at destination and if said goods fail to comply with said warranty he shall, within five days after the date of arrival at destination give written notice by registered mail to Walter Pratt & Co., Chicago, Ill., otherwise all warranties of said goods is waived."

Defendant refused to pay for the goods, claiming a breach of warranty of the quality on the ground that the goods did not class with the sample. The last portion of the goods were not delivered until August 14th and defendant gave notice of the defectiveness of the first shipment within three days after that. The court held that that was not in time.

"The contract by its terms applied to the goods and each part thereof and requires the notice to be given within five days from the date of arrival. This was not done and no defense can be maintained upon the warranty."

It was also contended by defendant that inspection of the goods within five days was impossible, and the court instructed the jury as follows:

"That if they believed from the evidence that the goods delivered by plaintiffs to defendant did not come up to the samples shown by plaintiff's salesmen at the time the contract was made, and shall further believe from the material of said goods that by an examination it could not be made and defects found out within five days from the date of the delivery that said goods did not come up to said samples and that defendant did within a reasonable time examine said goods and offer to return the same to plaintiffs and has since and now holds them subject to plaintiff's order, they shall find for the defendant.

"The defendant stated that this instruction was erroneous. Morris, the defendant, was an experienced druggist. He understood the nature of the goods as well as the salesmen and knew whether they could be examined in five days or not. The contract was deliberately made and the court cannot make a contract for the parties. While it would have been inconvenient to have examined the goods in five days and we think it could have been done by diligence, but whether it could or not Morris knew this when he made the contract just as well as he does now. If the defects could not be determined in five days, then he should not have bought the goods under the contract. *The contract must be enforced as the parties made it, there being no fraud or mistake in its execution.*"

But assuming that the court's interpretation of the contract is right, the jury was justified in returning a verdict for nominal damages, as plaintiff failed to furnish a reasonable basis for computing the damage suffered by reason of the breach of warranty.

Section 3313 of the Civil Code of the State of California provides:

> "The detriment caused by the breach of warranty of the quality of personal property is deemed to be the excess, if any, of the value which the property would have had at the time to which the warranty referred, if it had been complied with, over its actual value at that time."

It does not appear what was the actual value of the salmon delivered. Nor did plaintiff present any evidence to prove what its value would have been at the time to which the warranty referred had the contract been complied with. Had the jury awarded substantial damages to plaintiff, the verdict would not have been supported by the evidence.

Having eliminated the second count, plaintiff's right to a reversal of the judgment depends upon the sufficiency of the fourth count of its complaint. This count alleges in substance, the execution of the written contract and the express warranty therein contained that the salmon to be delivered in the year 1912 would be equal to the 1911 pack; that in October, 1912, defendant submitted to plaintiff samples which plaintiff claimed were

taken from the 1912 pack; that these samples were furnished according to a custom, which had been practiced by the parties for several years; that the samples examined by the plaintiff were fully equal to the 1911 pack of Archer Brand salmon and were edible and suitable for human consumption and that relying upon the representation of defendant with reference thereto, plaintiff accepted delivery of the entire shipment and paid the purchase price therefor. It is then alleged that salmon delivered was not equal to the samples and that defendant is estopped from asserting or maintaining that plaintiff is precluded from asserting any claim for damages for breach of the contract for failure to make such claim within ten days after the removal of swells as provided for in the contract, by reason of the representations made by defendant respecting the samples.

It is important to note in this connection that in this count, plaintiff admits that the contract between it and defendant should be interpreted in the manner contended for by defendant, namely, that all claims for reclamation of *any* nature must be made within a limited time and that failure to assert such claim within that period bars the present action.

The evidence in this case, however, did not warrant a verdict in favor of plaintiff on the theory of an estoppel. In order that a party to an action may be estopped from asserting his rights in the

premises, it is necessary (1) that the party to be estopped made the representations attributed to him with intention to deceive or with such carelessness or negligence as to amount to constructive fraud; (2) that the innocent party relied upon such representations and was injured thereby.

The earliest and probably the best known case in this state involving the question of estoppel is Biddle Boggs v. Merced Mining Co., 14 Cal. 279, an action involving the title to the famous Mariposa grant in which Hon. Stephen J. Field participated. The rule applicable to cases of estoppel is expressed in the last mentioned case in substantially the language which we have adopted above. Neither of these essential elements to the creation of an estoppel exists in the case at bar. The only evidence as to how the samples were obtained was given by Crescent P. Hale, general superintendent of the defendant. (Trans. p. 147.) He stated:

> "I drew the samples for plaintiff; I took only one can from each case—taken indiscriminately; I didn't attempt to pick out any particular cans for sample purposes; the samples from external appearance and weight were the same as the other tins."

The records of the warehouse company in which the salmon was received, show that three cases of salmon were delivered to the American Trading Company prior to the time that the bulk of the shipment was sent in accordance with plaintiff's

directions. These three cases were a part of the 1912 pack. (Trans. p. 150.)

A. B. Field, manager of the canned goods department of the plaintiff, admitted that he had no reason to believe that the samples furnished him were not taken from the 1912 pack and that three cases of samples were received by him prior to the delivery of the shipment. (Trans. p. 48.)

This testimony negatives any suggestion that defendant delivered to plaintiff as samples any goods other than from the lot purchased by the plaintiff in 1912, or that they were not a fair sample of the pack.

From the testimony of the same witness, it appears that the samples were not furnished as a substitute for inspection by the plaintiff, but to send to prospective customers. The following extract is from the cross-examination of Mr. Field. (Trans. p. 62):

> "Q. Those samples were for what purpose?
>
> A. Representing the salmon that they were to give me—the Archer salmon they were to deliver me.
>
> Q. To be used by you for the purpose of issuing samples for resale?
>
> A. Yes; they were asked for that purpose.
>
> Q. In other words, in your business when you called on Mr. Haller to discuss the 1912 pack and your business with him, you asked him to send some samples so that you might

send them to your different customers in order for you to resell them?

A. Correct.

* * * * * *

Q. *You say that you told him to send you these samples to send to your customers?*

A. *Yes.*

Q. And they were from the lot of salmon that you had bought?

A. That was my belief; yes."

Equally unsupported is the allegation of the fourth count that it was customary for plaintiff to receive samples of the pack in its prior dealings with defendant and to take these samples instead of the bulk of the shipment. Defendant produced and introduced in evidence a letter written by plaintiff to defendant on November 8, 1910 (Trans. p. 135) in which instructions are given to ship a portion of the do-overs contracted for in that year to Portland. As a postscript thereto, appears the following:

> "Kindly send to this office one case of Acher salmon to use as sample at your earliest convenience."

In view of the fact that a part of the goods purchased in that year had already been delivered to plaintiff, this letter shows conclusively that the samples submitted in the year 1910 were for the purpose of resale. The record in this case therefore clearly indicates that defendant practiced no fraud upon plaintiff, nor did it act in such a careless or negligent manner as to amount to construc-

tive fraud, nor did plaintiff suffer any injury by reason of the samples furnished by defendant. Recovery under the fourth count of the complaint is precluded, because there is no evidence to support the same. We apprehend that plaintiff does not rely very strongly upon this count, for he devotes only a few pages in his brief to a consideration of the same.

Thus far, we have attempted to show that as to the main issue involved in this proceeding, the judgment rendered was the only possible judgment which the jury could have returned.

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3. THE TRIAL COURT PROPERLY EXCLUDED THE JUDGMENT ROLLS OFFERED IN EVIDENCE BY PLAINTIFF.

The testimony of various witnesses proved that a very considerable portion of the salmon purchased by plaintiff was destroyed by the pure food authorities both federal and local. As the testimony of these witnesses was true, no contradictory evidence was offered by defendant, though we contend that such evidence was beside the issues. In addition, plaintiff asked to have the judgment rolls in the various cases in which the salmon was destroyed introduced in evidence. If such testimony had any relevancy, it was simply for the purpose of further strengthening the statements of witnesses already examined. The effect could only be cumulative and as the fact was not denied by de-

fendant, it was entirely unnecessary to introduce these documents. The court very properly excluded the same and such ruling is assigned by plaintiff as error. Counsel does not attempt to show how this testimony was relevant nor what injury his client sustained by reason of the exclusion thereof, but contents himself with the statement:

> "The importance and materiality of the evidence and the prejudicial character of the court's error in refusing to allow these records to go in evidence hardly requires comment."

We confess our inability to appreciate the materiality of the testimony or the prejudicial character of the court's error, in the absence of a discussion thereof by plaintiff.

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4. THERE WAS NO ERROR IN THE COURT'S REFUSAL TO GIVE THE INSTRUCTIONS REQUESTED BY PLAINTIFF NOR WAS ERROR COMMITTED IN THE INSTRUCTIONS AS GIVEN.

We deem it unnecessary to enter into an extended discussion of the instructions proposed by plaintiff which were not given or were given in modified form by the trial court. Plaintiff contends that certain instructions should have been given upon the theory that the second count of its complaint could be sustained on the ground that the contract in controversy here was void. This matter has already been discussed and if our contention is correct, the court was justified in refusing to

instruct the jury as requested by opposing counsel. The instructions given were sufficient to safeguard plaintiff's rights and a reading of the same, together with the instructions proposed by plaintiff, shows that the court incorporated in its charge to the jury everything requested by plaintiff which was proper under the pleadings and the evidence.

Irrespective of the merits of this assignment of error, the record shows conclusively that no exception was properly taken to these instructions.

The rules of practice of the United States District Court for the Northern District of California, Section 91, provide:

> "Exceptions to a charge to a jury, or to a refusal to give as a part of such charge instructions requested in writing, may be taken by any party by stating to the court before the jury have retired, that such party excepts to the same, specifying by numbers of paragraphs or in any other convenient manner the parts of the charge excepted to, and the requested instructions the refusal to give which is excepted to, and specifying the grounds of such exceptions. As to the charge given by the court of its own motion, the grounds of exception shall be specific; as to instructions requested by the parties the grounds may be general."

Plaintiff did not comply with this rule of court. The transcript shows that prior to the argument of the case, plaintiff submitted in writing to the court certain proposed instructions. The court charged the jury orally and did not adopt the exact language of any of the proposed instructions of either

party. When the court had concluded its instructions, the following proceedings occurred:

> "Mr. KNIGHT. Will your Honor give us an exception as to each instruction requested on behalf of the plaintiff which the court did not give and each requested instruction the court gave in a modified form?
>
> The COURT. I don't think I gave any of your instructions—I extracted the principle.
>
> Mr. KNIGHT. I don't know whether it may be considered a modification the extraction of the principle.
>
> The COURT. You are entitled to an exception.
>
> Mr. WISE. I don't understand that it is your Honor's rule that such exceptions may be taken in an omnibus way, but your Honor's attention should be directed to those parts of the court's charge to which counsel excepts."

The foregoing indicates the failure of plaintiff to specify the grounds of exception to the court's charge. Attention was directed to this omission by opposing counsel, but plaintiff did not restate his exception so as to comply with the court's rule. This rule is eminently fair and is designed to prevent the necessity of a retrial of a cause for mere technical failure to give instructions proposed by counsel. By specifying the grounds for the exception, an opportunity is given the court to correct any error inadvertently made in instructing the jury. Plaintiff's failure to specify his grounds for exception cannot be condoned because of inadvertence, as attention was directed at the time to the rule of court on this subject.

We regret that the limited time at our disposal to file this brief has prevented a more complete discussion of the points raised by plaintiff. It has been impossible for us to review all of the cases cited by counsel in support of his contentions. We believe, however, that we have sufficiently shown that the judgment in this case is fully supported by the record and that no error exists which entitles plaintiff to a new trial. Inasmuch as defendant was entitled to a judgment in its favor, plaintiff has received more than it was entitled to and cannot be heard to complain thereof. We respectfully submit that the judgment should be affirmed.

Dated, San Francisco,
October 15, 1917.

Otto Irving Wise,
Attorney for Defendant in Error.